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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 134

A/S J. LUDWIG MOWINCKELS REDERI, ET AL.,
Appellants,

vs.

ISBRANDTSEN CO., INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

ROSCOE H. HUPPER,
BURTON H. WHITE,
Counsel for Appellants.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 47-749

ISBRANDTSEN CO., INC.,

Plaintiff,

against

UNITED STATES OF AMERICA, NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE, CONTINENTAL NORTH ATLANTIC WESTBOUND FREIGHT CONFERENCE, A/S J. LUDWIG MOWINCKELS REDERI, BLACK DIAMOND STEAMSHIP CORPORATION, COMPAGNIE GENERALE TRANSATLANTIQUE, COMPAGNIE MARITIME BELGE, CUNARD WHITE STAR, LTD., DAMPSKIBSSELSKABET AF 1912 A/S, A/S DAMPSKIBSSELSKABET SVENDBORG N. V. NEDERLANDSCH-AMERIKAANSCHE STOOMVAART-MAATSCHAPPIJ, UNITED STATES LINES COMPANY, WATERMAN STEAMSHIP CORPORATION, ELLERMAN'S WILSON LINE, LTD., AND SOUTH ATLANTIC STEAMSHIP LINE INC.,

Defendants,

FEDERAL MARITIME BOARD AND UNITED STATES DEPARTMENT OF AGRICULTURE,

Intervenors

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, carrier defendants-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has juris-

diction on appeal to review the final order and judgment of the District Court entered in this cause.

Opinion Below

The March 20, 1951 opinion of the statutory District Court for the Southern District of New York is not yet reported. A copy of the Court's opinion, its final order and judgment, its order entered March 26, 1951 denying motions for reconsideration, and the order of the Federal Maritime Board dated December 1, 1950 are attached hereto as Appendices A, B, C and D, respectively.

Jurisdiction

The final order and judgment of the three-judge statutory court was entered on March 21, 1951. Judgment, including taxed costs of $1895.60, was entered and docketed April 5, 1951. An order denying appellants' motion for reconsideration was entered on March 26, 1951. A petition for appeal is presented to the District Court herewith, to wit on May 17, 1951.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b).

The following decisions sustain the jurisdiction of the Supreme Court to review the final order of the District Court in this case on direct appeal: *U.S.* v. *American Union Transport Co.*, 327 U.S. 437; *U.S.* v. *Hancock Truck* Lines, 324 U. S. 774; *California* v. *U.S.*, 320 U.S. 577; *Isbrandtsen-Moller* v. *U.S.*, 300 U.S. 139; *Swayne & Hoyt, Ltd.* v. *U.S.*, 300 U. S. 298.

Question Presented

Did the statutory court lawfully and properly set aside the December 1, 1950 Report and Order of the Federal

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Maritime Board on the ground that a proposed percentage differential as between contract and non-contract freight rates found permissible by said Board was "arbitrary" and "unjustly discriminatory"; and did said Court thereupon lawfully and properly grant a permanent injunction to plaintiff carrier against defendants contracting with shippers under the Commission-approved contract rate system?

This question stems from circumstances outlined as follows:

1. Conference Agreements in customary form approved by the Maritime Commission under Section 15 of the Shipping Act 1916, authorized their members, being carriers of both American and foreign nationality, to contract with shippers at differentially lower rates under the contract/non-contract rate system so-called in respect of exclusive patronage. The Agreements were open to membership by any other regular foreign trade ocean carrier applying therefor.

2. Plaintiff, a competing carrier, not a Conference member, proceeded against the Conference carriers (defendants) before a three-Judge statutory court to enjoin them from employing said contract rate system, on the charge that it constituted retaliation against shippers within the prohibition of Sec. 14(3) of the Shipping Act 1916, for which reason plaintiff claimed that said system was not lawful to be authorized in said approved Conference Agreements.

3. The Court ordered the matter referred to the Maritime Commission, and said Commission and said Maritime Board, its successor, conducted exhaustive administrative proceedings in relation to the charge in the complaint and the propriety of the contract rate system. Reports were made by an Examiner of the Board, and the Board by its Report

of December 1, 1950, which included findings, and by its Order of said date, determined that said contract rate system as authorized by said Conference Agreements was not retaliatory against shippers and did not violate the Shipping Act as charged, but was lawful and permissible.

Defendant carriers contend that the Court had no authority or right, and that it exceeded its lawful authority in making its March 21, 1951 Order and Judgment, wherefore they represent that the same should be reversed and vacated. The matter was most carefully dealt with both by the Commission and by the Board, free of "woosh-woosh", a designation suggested by Frank, C. J., in the *Old Colony Bondholders* case, 161 F. (2d) 413, at 450. The Board did not omit a "rational explanation", nor may its December 1, 1950 Report and Order be called "arbitrary and capricious"—see Frank, C. J., *id.* at 452.

Note

This case was presented to the Supreme Court under Docket No. 622, October Term 1948, by direct appeal from the interlocutory injunction order issued by the statutory court dated January 7 and entered January 13, 1949, concurrently with its order that the subject-matter of the complaint be heard in the first instance by the Maritime Commission. The Supreme Court on April 4, 1949 dismissed said appeal without opinion, 336 U.S. 941. Said dismissal is assumed to have been made on the ground that the subject-matter was then pending before the Maritime Commission.

Statutes Involved

Sections 14, Third, 15 and 22 of the Shipping Act, 1916 (Title 46, U.S.C. Secs. 812(3), 814 and 821; 39 Stat. 733, 736) are set forth in Appendix E hereto.

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Statement

Appellants are common carrier steamship lines in the ocean foreign trade between the United States and various other countries. For substantial periods they have been associated together in Conferences pursuant to Sec. 15 of the Shipping Act, 1916, for the purpose of maintaining uniform rates and practices in the transportation of cargo. Membership in these Conferences is open to any carrier regularly operating in the trade. The Conference agreements, having received the Board's approval, are expressly exempted from the provisions of the anti-trust laws. They authorize the Conferences to "provide specific contract and non-contract rates."

Under the so-called "contract rate" practice, as thus authorized and employed over a period of many years by approved Conferences in foreign ocean trade, any shipper desiring to contract for exclusive routing on Conference vessels has been afforded the benefit of rates lower by a fixed percentage than the regular "non-contract" rates for the same commodities, as well as assurance of rate and service stability for certain periods.

Contract rates covering some 40% of the tariff items but the bulk of the cargo transported, were suspended during World War II and the immediate postwar era, when shipping was so largely under government control. On October 1, 1948, these Conferences gave notice of the reinstatement of the contract rate system, as of November 1, 1948, on all commodities on which there was regular movement. Some 3,000 contracts were executed by shippers prior to October 28, 1948.

On that date appellee Isbrandtsen, a non-conference carrier, which had not chosen to apply for Conference membership, by virtue of which it would have participated in defendants' contracts with shippers, obtained a District

Court order, restraining the appellants from instituting the proposed contract rate system, and filed its complaint seeking a permanent injunction on the basis that the U. S. Maritime Commission, now the Federal Maritime Board*, could not validly approve any contract rate system. The complaint named the United States as a statutory defendant (Title 28, U.S.C. Sec. 2322). The Maritime Commission intervened and joined appellant carriers in a motion to dismiss the complaint on the ground that the Commission had primary jurisdiction of the subject-matter. On January 13, 1949 the Court denied the motion, but nevertheless granted a temporary injunction conditioned on plaintiff Isbrandtsen's diligent prosecution of a complaint before the Maritime Commission. 81 F. Supp. 544. An appeal from the denial of appellants' motion, and granting of injunction, was dismissed without opinion, 336 U.S. 941.

Pursuant to the Court's direction, Isbrandtsen filed its complaint before the Commission, and extended and exhaustive hearings were held before its Trial Examiner. After argument on exceptions to the Examiner's first recommended decision, the Commission remanded the record to him for further findings. The Commission was abolished before it could review the Examiner's second report, so that exceptions thereto were argued before its successor, the Federal Maritime Board.

On December 1, 1950 the Board handed down a decision with full discussion, findings and legal references. Its Report, in general accordance with the Examiner's recommendations, held that the proposed contract rate system (subject to certain modifications in the contract form—immediately agreed to by defendant carriers) was not

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* On May 24, 1950 the President, by Reorganization Plan No. 21 of 1950, with the acquiescence of Congress, created the Federal Maritime Board and transferred to it certain powers of the United States Maritime Commission, including those set forth in 46 U.S.C. Secs. 812-19, 821-832.

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unjustly discriminatory or unfair, did not operate to the detriment of the commerce of the United States, and was not in violation of the Shipping Act, 1916. Accordingly, an order was entered on December 1, 1950 dismissing Isbrandtsen's complaint before the Board.

Isbrandtsen thereafter amended its District Court complaint to request that the Board's December 1, 1950 order also be set aside—in addition to the Commission's orders which had approved the Conference Agreements. The Department of Justice and the Department of Agriculture, which had intervened before the Commission, supported Isbrandtsen's position.

After hearing all parties December 20, 1950, the Court filed an opinion on January 25, 1951 granting a permanent injunction and setting aside the Board's December 1, 1950 order. This opinion was later recalled and vacated by a "supplemental opinion", including injunction order, dated March 20, entered March 21, 1951. Appellants' "motion for reconsideration" made February 20, 1951 was denied by order entered March 26, 1951.

In its opinion the Court found it unnecessary to decide whether the Shipping Act, 1916, prohibited any contract rate system—the only issue raised before the Maritime Commission and the Board. Rather it held that the Trial Examiner's finding of fact that the proposed non-contract rates were fixed by means of an arbitrary 20% to 30% differential required it to conclude as a matter of law they were necessarily unjustly discriminatory and unlawful and hence they could not be approved by the Board.

The present appeal is from the final order of March 21, 1951, setting aside the Federal Maritime Board's order of December 1, 1950 and permanently enjoining appellants from instituting the proposed contract rate system.

The Questions Raised Are Substantial

The Court's decision is not merely violative of the basic principle that administrative determinations are conclusive barring the lack of evidence or clear error of law, but rests upon Court determination of a rate issue not directly presented by the parties or dealt with by the Board. If such issue had been presented it would have been singularly for administrative rather than Court determination. Such a usurpation of the Board's primary function is destructive of its whole function under the Shipping Act, 1916 and contrary to the principles of the Administrative Procedure Act (5 U.S.C. Sec. 1009, 60 Stat. 243)—with far reaching effects upon the carefully declared shipping policies of the United States and the development of our Merchant Marine thereunder. This calls constantly for special consideration in view of the competitive situation in relation to the shipping of other nations.

Because of the prevalence of destructive competition in ocean shipping, with resultant instability of rates and service; and particularly because of the international aspects of foreign trade which made regulation and supervision so difficult, Congress, following the recommendations of the Alexander Committee (H.R. Doc. 805, 63rd Congress, Second Session) provided in the Shipping Act, 1916, a broad policy of cooperation and agreement not subject to the anti-trust laws but rather to the supervision of the Shipping Board, later the Maritime Commission (now the Federal Maritime Board) as guardian of the public interest. As pointed out by the Supreme Court in *United States Nav. Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 485 and again in *Swayne & Hoyt, Ltd.* v. *U.S.* 300 U.S. 297, 304, the questions involved in the administration of this policy are of an exceptional character, the solution of which calls for the exercise of a high degree of expert and technical knowledge.

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The weighing of the multitudinous factors which enter into a determination of the issues here presented is therefore a matter peculiarly for the expert administrative body and its determination should not and cannot be lightly set aside.

Congress in passing the Shipping Act 1916 was bound to content itself with substantially a set of general rules of law. The most important was Section 15 which authorizes Conference cooperation under approval by the administrative body and that cooperation under Section 15 is really nothing more than a pattern or background. That does not mean, however, that Congress relinquished necessary or important controls. To the contrary, the same are definitely provided in broad and general, but nevertheless effective, provisions in the later sections of the Act, of which either the Board or private complainants may avail.

The Board has power to cancel Conference agreements if the cooperating carriers persistently act unfairly in respect of their rates or otherwise. An example of this is *Edmond Weil* v. *Italian Line ITALIA*, 1 U. S. M. C. 395. That decision shows that unless the Conference carriers should conform, their agreement may be cancelled.

Among the facts found by the Board in the instant case were the following: The contract rate system encouraged regular and frequent sailings; guaranteed uniform rates to large and small shippers on an equal basis; enabled the lines to estimate the volume of traffic, tonnage their routes and arrange sailings; prevented cutthroat competition; and afforded shippers the necessary rate security for forward trading. The Board further found that in the absence of a conference in the trade, the foreign lines could charge lower rates than American flag lines; that there was no evidence that the contract rate system had eliminated a non-conference line from the trade or illegaliy prejudiced plaintiff or any such line; that appellee Isbrandtsen had been

able to charge higher rates as a result of the contract rate system than would have been possible had there been unbridled competition with open rates and that no evidence was offered to show that the American Merchant Marine had suffered because of the contract rate system. The evidence showed also that Isbrandtsen had sometimes employed a contract rate system. Such findings, which are supported by the record, formed the basis of the Board's ultimate conclusion that the contract rate system was not in violation of the statute. The weight to be given to such considerations as against others in the case was purely for the Board.

Instead of giving effect to the Board's findings which fully justified its conclusion that the contract rate systems were lawful, the Court shifted its attention to the "spread" between contract and non-contract rates and the method of arriving at the differential, a matter which had not been in dispute and was apparent to the Court from the face of the complaint even before Isbrandtsen was required to prosecute its complaint before the Commission. If any inference was to be drawn from the uncontested fact of the differential ("spread") and method of arriving at same, such inference would properly be for the Commission (Board). *Federal Trade Commission* v. *Pacific Paper Ass'n.*, 273 U.S. 52, 63; *Medo Corp.* v. *N.L.R.B.*, 321 U.S. 678, 681 note; *United States* v. *Louisville & Nashville R.R.* 235 U.S. 314, 320-1; *B. & O. R.R.* v. *U.S.*, 298 U.S. 349, 359. The Trial Examiner did draw such inference in finding:

> "Merely because the [Conference] lines are willing to take less for transporting the cargo of contract shippers does not mean that the non-contract rates are unreasonable to the extent that they exceed the contract rates."

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The Court took it upon itself to isolate one particular adjective contained in one finding of fact, and construed the word "arbitrary" in such a manner as to contradict the Board's ultimate conclusion and, on the basis of its misconstruction, set aside the Board's carefully considered decision. That language proposed by appellee Isbrandtsen and approved by the Trial Examiner was to the effect that the "non-contract rates * * * were fixed by means of an arbitrary differential at a level 20% to 30% higher" than the contract rates. Since Sec. 15 of the Shipping Act gives the Board power to disapprove agreements which it finds to be unjustly discriminatory, the Court treated this finding as requiring the Board to hold that the contract rate practice was unjustly discriminatory and hence was violative of the statute.

In its finding that the difference between the contract and non-contract rates was established by means of an "arbitrary" percentage, the Board was clearly referring to the fact that these rates bore a fixed mathematical relationship to one another. Read in the light of the Board's other findings and its ultimate conclusions, the word "arbitrary" patently referred only to the *a priori* process by which the percentage differential was established. In the same sense percentage reductions in round trip or commutation fares, are equally "arbitrary." "Arbitraries" is a common expression, and perfectly well understood as legal, in respect of railroad rates—nonetheless so as concerns water rates.

Whether or not the quantum of such a differential is "arbitrary" in the sense of being unjustly discriminatory must always depend upon a competent evaluation of all the surrounding facts and circumstances. If that were in issue it would necessarily be a matter for administrative determination.

That the quantum of the differential was not arbitrarily arrived at in the sense volunteered by the Court is clear since the same differential had long been in effect. Moreover, it had been approved by the Commission in *Phelps Bros. & Co.* v. *Cosulich Societa, etc.*, 1 U.S.M.C. 634, and had not been disapproved before the Commission in other contract rate cases. *Contract Routing Restrictions*, 2 U.S.M.C. 220; *Cargo to Adriatic, Black Sea & Levant Ports*, 2 U.S.M.C. 342. Other like decisions are *Rawleigh* v. *Stoomvart, et al.* 1 U.S.M.C. 285, 288; *Pacific Coast European Conference Agreement*, 3 U.S.M.C. 11. The advantages of such rate differential were expressly recognized and approved in the report of the Alexander Committee which formed the basis of the 1916 Shipping Act. A rate practice which has long been in effect, and particularly where it has met with administrative approval in other proceedings, is entitled to a presumption of reasonableness and validity. *Copper River Packing Company* v. *Alaska S.S. Co.*, 22 F.(2d) 12; *Interstate Commerce Commission* v. *Chicago and Great Western Railway Co.*, 209 U.S. 108; *American Railway Express Company* v. *Lindenburg*, 260 U.S. 584. It is necessary and appropriate that differentials be "arbitrarily" fixed in the sense of their relationship to one another otherwise they would be open to the charge that they were discriminatory as to competing commodities and as between high and low rate commodities.

It is basic that a report be read as a whole and that if the administrative finding can be read as a whole and be construed, if possible, to sustain the Board's conclusion. If the Board's conclusion can be sustained on any basis it is not the prerogative of the Court to pick out another in order to upset it. *B. & O. R. R. Co.* v. *U.S.*, 304 U.S. 58, 60; *N.L.R.B.* v. *Hudson Motor Car Co.*, 136 F.(2d) 385, 387 (6 Cir., 1943); *N.L.R.B.* v. *George P. Pilling & Son Co.*,

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119 F.(2d) 32, 33 (3 Cir., 1941); *Chicago etc. R. Co.* v. *U.S.* 33 F.(2d) 582, 586, aff'd 282 U.S. 311.

> "The judicial eye must not in the first instance rove about searching for evidence to support other conflicting inferences and conclusions which the judges or the litigants may consider more reasonable or desirable." *Commissioner* v. *Scottish American Inv. Co.*, 323 U.S. 119, 124.

The objects of the Conference System in the avoidance of rate wars and the assurance of stability of rates and services were recognized as advantageous to shippers, carriers and the public by the Alexander Committee and by Congress when it adopted the Committee's recommendations in enacting the Shipping Act, 1916. It was recognized by the Committee and by the Federal Maritime Board that the Conference System which binds only the Conference members, affords rate protection to non-conference lines but is most vulnerable to their competition. The contract rate system was designed to protect the Conference lines from attack by such outsiders and if the recognized benefits of the system are to be preserved such protection must be afforded. This was the basis of the Board's approval of the contract rate practices here involved and is illustrative of the far reaching consequences of the Court's decision and order to shippers, carriers and the public.

THE CONTRACT RATE SYSTEM HAS BEEN EMPLOYED IN MARITIME COMMERCE FOR MANY YEARS IN MANY TRADES THROUGHOUT THE WORLD. THE SUBJECT-MATTER OF THIS LITIGATION IS OF WORLD-WIDE IMPORTANCE AND INTEREST. WE BELIEVE THERE CAN BE NO QUESTION OF THE SOUND MERIT OF THE PRESENT APPEAL.

Dated: New York, N.Y. May 17, 1951.

Respectfully submitted,

ROSCOE H. HUPPER,
BURTON H. WHITE,
Counsel for Carrier Defendants—Appellants.

APPENDIX "A"

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civ. 47-749

ISBRANDTSEN CO., INC., *Plaintiff*

v.

UNITED STATES OF AMERICA, NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE, CONTINENTAL NORTH ATLANTIC WESTBOUND FREIGHT CONFERENCE, A/S J. LUDWIG MOWINCKELS REDERI, BLACK DIAMOND STEAMSHIP CORPORATION, COMPAGNIE GENERALE TRANSATLANTIQUE, COMPAGNIE MARITIME BELGE, CUNARD WHITE STAR, LTD., DAMPSKIBSSELSKABET AF 1912 A/S, A/S DAMPSKIBSSELSKABET SVENDBORG, N. V. NEDERLANDSCH-AMERIKAANSCHE STOOMVAART-MAATSCHAPPIJ, UNITED STATES LINES COMPANY, WATERMAN STEAMSHIP COMPANY, ELLERMAN'S, WILSON LINE, LTD., and SOUTH ATLANTIC STEAMSHIP LINE INC., *Defendants*

Before: Jerome N. Frank, Circuit Judge, and Sylvester J. Ryan and Samuel H. Kaufman, District Judges.

Suit by Isbrandtsen Co., Inc., against the United States and two conferences of steamship carriers and their members to enjoin and set aside so much of an order of the Federal Maritime Board as approves provisions, in conference agreements, for contract and noncontract rates. The Board and the carriers moved to dismiss the complaint.

Motion to dismiss denied. Injunction granted.

John J. O'Connor, (William L. McGovern, of counsel) for plaintiff;

Burlingham, Veeder, Clark & Hupper (Roscoe H. Hupper and Burton H. White, of counsel) for North Atlantic Continental Freight Conference *et al.*

Paul D. Page, Jr. and George F. Galland, Washington, D. C. for Federal Maritime Board;

Gareth M. Neville and Robert Murray (Malcolm Hoffman, of counsel) for Department of Justice;

Henry A. Cockrum, for Secretary of Agriculture.

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The earlier stage of this litigation is reported in 81 F. Supp. 544. As the statement of facts therein makes clear, Eastbound Conference Agreement No. 4490—from its initial approval by the U. S. Maritime Commission on August 25, 1935, through subsequent amendments as approved by the Commission down to the present—has provided for contract-noncontract rates, although the Conference has not availed itself generally of this power in the past. Agreement No. 7920-1, to which the Westbound Conference is a party, as approved by the Commission on August 24, 1948, similarly undertakes to authorize the use of contract-noncontract rates in the Westbound trade. On October 1, 1948, the defendant carriers sent notices to all known shippers in the North Atlantic trade that effective November 1, 1948, the exclusive patronage contract-noncontract rate system would be inaugurated; the contract rates were to be the then prevailing freight rates, but shippers who refused to enter into contracts to ship with the conference lines exclusively when those lines could provide transportation, were to be charged noncontract rates to be fixed by an arbitrary differential at a level 20% to 30% higher than the contract rates. On Isbrandtsen's motion, this court granted a temporary injunction, restraining the defendant carriers from instituting the exclusive patronage system, conditioned upon Isbrandtsen's diligent prosecution before the Maritime Commission of a complaint challenging the validity of these Conference agreements.

Subsequently, Isbrandtsen filed a complaint with the Maritime Commission. The United States (by the Attorney General) and the Secretary of Agriculture intervened in support of the complaint. Evidence was taken before a trial examiner who made two reports. Before the Commission finally acted on these reports, it was abolished.

Its successor, the Federal Maritime Board, thereafter made a decision and order on December 1, 1950, which will be found in 3 F.M.B. —, approving the contract-noncontract rate provisions of the conference agreements and dismissing Isbrandtsen's complaint.

Isbrandtsen then filed in this court an amended complaint, which referred to the Board's order and asked that it be enjoined. The United States (by the Attorney General)

appeared, and the Secretary of Agriculture was permitted to intervene.[1] They argued in support of the injunction. The Board and the conference carriers appeared, moved to dismiss the suit, and argued in opposition to the proposed injunction.

Frank, C. J. delivered the opinion of the court.

1. The plaintiff, the Attorney General, and the Secretary of Agriculture contend that in no circumstances can a dual-rate provision (i.e., an exclusive patronage, or dual-rate, or contract-noncontract provision) in a conference agreement be valid under 46 U.S.C. Sec. 812, Third.[2] We need not, and do not, decide whether or not that contention is sound.[3] For the purposes of this decision, we shall assume that, as the Board contends, in some circumstances the Board may, pursuant to 46 U.S.C. Sec. 814,[4] approve a conference agree-

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[1] As to the appearance by the Attorney General, see 46 U.S.C. Sec. 830, 28 U.S.C. Secs. 2322, 2323. As to the intervention of the Secretary of Agriculture, see 7 U.S.C.A. Sec. 1622(j); 5 U.S.C.A. Secs. 1005(a) and 1009(a); cf. Associated Industries v. Ickes, 134 F. (2d) 694, 711-712 (C.A. 2).

[2] It reads: "No common carrier by water shall, directly or indirectly, . . . Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason."

[3] In an Appendix to this opinion, Judge Frank has set forth some of the arguments for and against that position. Judges Kaufman and Ryan do not participate in that appendix.

[4] It reads:

> "Every common carrier by water, or other person subject to this chapter, shall file immediately with the commission a true copy . . . of every agreement, with another such carrier or other person subject to this chapter, . . . to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic

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ment containing such a provision. For even so, we think that, on the record now before us, the dual-rate provision in each of these conference agreements is invalid.

2. In effect, the Board's position is that such a provision may be authorized under Sec. 814 unless the Board finds that it is "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports."[5] But the Board has made a finding, and the evidence before the Examiner shows that the announced contract and noncontract rates of the conference carriers, acting pursuant to the dual-rate provisions of the conference agreements, were such that the spread between those rates was arbitrary. The conference carriers thus interpreted the dual-rate provisions of the conference agreements as authorizing such an arbitrary spread, and the Board held valid the dual-rate provisions thus interpreted.

The effect of the Board's order is to approve the dual-rate provisions which permit unreasonable spreads between the contract and noncontract rates. We hold such dual-rate provisions to be unlawfully discriminatory between shippers and we therefore set aside the Board's order.

3. In Swayne & Hoyt Ltd. v. United States, 300 U. S. 297, 303, the Court said that a differential, pursuant to a confer-

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to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. . . .

"The commission may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. . . .

"All agreements, modifications, or cancellations made after the organization of the commission shall be lawful only when and as long as approved by the commission, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

"Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto. . . ."

[5] We discuss infra this interpretation of Sec. 814.

ence agreement, between contract and noncontract rates was "prima facie discriminatory since the two rates were charged for identical services and facilities. . . ."[6] As the Board, in justifying its decision, refers to decisions of its predecessors,[7] it is well to note that in Rawleigh v. Stoomvart, 1 U.S.S.B. 285, 293, the Shipping Board said that a contract-noncontract clause in a conference agreement would violate the statute "where the spread is such in amount as to constitute unlawfulness."[8]

4. Here, then, the complainant, before the Board, made out a case of unlawful discrimination by presenting the agreements containing the dual-rate provisions together with proof of the unreasonableness of the spread between the announced contract and non-contract rates. For a witness called by the carriers, Andrews, Secretary since 1935 of one of the two Conferences,[9] testified on cross-examination, that "generally the non-contract rates were fixed at a differential of approximately 20% above the contract rates" and that: "I don't think the making of rates by differential is a proper basis, for that is an arbitrary

[6] Cf. Atlantic Refining Co. v. Ellerman & Bucknalls S.S. Co., 1 U.S.S.B. 242, 249-259. Cf. I.C.C. v. Mechling, 330 U. S. 567; Alabama Great Southern R. Co. et al. v. U. S., 340 U. S. 216 at 227.

[7] (a) The Shipping Act, in 1916, established the United States Shipping Board, and gave it powers conferred by many sections of that Act. 46 U.S.C. Sec. 801 et seq.

(b) Executive Order No. 6166 dated June 10, 1933, abolished the Board and transferred its powers to the Department of Commerce.

(c) The Act of June 29, 1936, 49 Stat. 1987, transferred those powers to the United States Maritime Commission.

(d) The President, by Reorganization Plan No. 21 of 1950, with the acquiescence of Congress created the Federal Maritime Board and transferred to it certain powers of the United States Maritime Commission, including those set forth in 46 U.S.C. Secs. 812-819, 821-832.

[8] This case is further discussed, infra.

[9] He is Secretary of the North Atlantic Continental Freight Conference.

[10] His testimony in full on this point is as follows:

"Q. Mr. Andrews, in establishing your contracts, (sic) non-contract rate system, it is my understanding that it was proposed to continue in effect after November 1st, the tariff that had been largely in exist-

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basis." [10] No evidence was offered contradicting this statement of the arbitrary nature of the differential.

The trial examiner made an initial report to the effect that the dual rate provisions were not illegal per se. After receiving this report, the Commission (later superseded by the Board) issued a supplemental order returning the case to the examiner with directions to make findings as to whether the exclusive-contract provisions of this case "(1) are unjustly discriminatory or unfair as between . . . shippers, or (2) operate to the detriment of the commerce of the United States, or (3) are in violation of the provisions of the Shipping Act. . . ." The order also directed the examiner to rule upon the proposed findings of fact submitted by the complainant.[11]

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ence prior to that date, but that after November 1st the rates in the present existing tariff would then become the contract rates, is that correct?

"A. Yes. We were establishing as a contract basis the tariff rates which had been in effect for some time.

"Q. How did you calculate what the non-contract rates would be? Were they arranged on a basis pretty much——

"A. (Interrupting) We followed the same pre-war practice that had been in effect in most of the trans-Atlantic trades, of substantially 20 per cent over the contract basis, rounding the figures out to the nearest nickel.

"Q. In other words, in general terms, the non-contract rates were going to be fixed on a differential of approximately 20 per cent above the contract level?

"A. That has been the basis pre-war, and the basis in effect to all of the European freight where there is a contract system.

"Q. Well, now, is it your own view that the rates which are fixed on a differential basis, either above or below other rates, are reasonable?

"A. We didn't fix them on a, so to speak, differential basis. We fixed them at specific rates in the tariff.

"Q. I understand that, but I also understand that generally the non-contract rates were fixed at a differential of approximately 20 per cent above the contract rates?

"A. That is correct.

"Q. And I am asking you whether in your judgment the fixing of any rate scale at any time on a differential basis is a reasonable method of making rates?

"A. I don't think the making of rates by differential is a proper basis, for that is an arbitrary basis."

[11] See the Commission's Rule 46, C.F.R. 201.191.

The examiner in his second report, pursuant to this order, found, as proposed by complainant, that the non-contract rates "were fixed by means of an arbitrary differential at a level 20% to 30% higher than the currently existing scale." [12] (As the testimony quoted in footnote 10 shows, the announced contract rates were fixed by adopting that scale.) The Board did not in precise terms adopt this finding. But, in oral argument before the court, counsel for the Board construed its decision as accepting the examiner's findings in so far as they were not inconsistent with its own report. There is nothing in the Board's report inconsistent with this finding of the examiner.[13]

[12] This finding reads in full as follows: "Shippers were informed that failure to sign such a contract would entail application to their shipments by respondent's lines after November 1, 1948 of noncontract rates which were fixed by means of an arbitrary differential at a level 20% to 30% higher than the currently existing scale."

[13] Moreover, the Board in its brief filed with us, candidly interprets the Board's decision as holding, in effect, that the purpose of the dual-rate provisions was, if possible, to bring about a condition in which an independent carrier would be compelled (through loss or threatened loss of profits) either to join the Conference or go out of business.

The Board's brief says: "The contract system should be frankly recognized as a device tending towards the monopolization of ocean commerce in particular trades by the members, collectively, of conferences which serve those trades. We use the word 'monopolization' with no ideological overtones, but merely in its dictionary sense, which is the obtaining or assumption of 'exclusive possession or control.' Whether the contract system in a particular case actually has the effect of producing a complete monopoly (i.e., control of a trade) depends upon how well it works; admittedly, it is monopolistic in purpose. The extent to which it is monopolistic in effect depends upon how successfully that purpose is achieved. . . . The record warrants the conclusion that if a contract system is wholly effective, it will result in a complete monopoly in the sense that all cargo moving in a trade where the system is used, will move in ships of conference carriers. Necessarily, in these circumstances, there would be no service by independent operators. . . . In considering the system itself (precedent to examination of specific contract provisions), we feel that this court should assume that the conference contracts are in fact effective; that shippers sign them in substantial numbers, voluntarily or as a choice of evils; that they exclude Isbrandtsen from carrying the freight of all shippers who sign; and that the contracts seriously restrict Isbrandtsen's access to cargoes for its ships, and will continue to do so if, and as long as, the conferences employ the contract system and Isbrandtsen remains a non-member."

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Accordingly, we conclude that the Board made this finding its own.

It should be added that, according to the evidence, the Conferences propose to offer contract rates to the federal government and its agencies, which ship by the conference carriers many tons of commodities, without requiring those shippers, as distinguished from private shippers, to sign exclusive patronage contracts.

5. We have, then, a specific finding, supported by the evidence, of a "constitutive" or "pivotal" or "basic" fact, i.e., that the spread between the rates announced, in accordance with the dual-rate provisions, was arbitrarily determined.[14] This specific finding is inconsistent with the Board's finding, as an "ultimate" fact and in the very words of the statute, that the "dual rate system . . . is not unjustly discriminatory or unfair as between . . .

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[14] The Board approved the conference agreements without holding hearings or taking evidence or making findings. It might be argued that, consequently, the first time the Board considered making an "order" concerning the validity of these agreements was in connection with the complaint proceedings involved in the instant case. Cf. North Carolina v. United States, 325 U. S. 507, 517. Were that argument accepted, it might then be argued that the order made in those proceedings is subject to the provisions of 5 U.S.C. Sec. 1006(c), so that the burden of proving the validity of the agreements was on the proponent of the order, i. e. the carriers. See also the Board's rule as to the burden of proof, 46 C.F.R. Sec. 201.122.

After approvals of the conference agreements in suit, the Board's predecessor, the Maritime Commission, promulgated an order, effective September 8, 1949, which is still in force and which provides as follows: When a proposed agreement is filed, the Board publishes a notice thereof, which advises interested parties that, within twenty days, they may request a hearing. The Board may then, in its discretion, order the holding of a hearing. If such a hearing is held, the burden of proof is obviously on the proponents of the approval. Of the Commission's order of September 8, 1949, counsel for the Board, in a letter to this court, stated: "General Manager's Order No. 106 was not published in the Federal Register inasmuch as it constituted a direction to the Commission's (now the Board's) staff on internal procedure, and in particular as to the manner in which notice should be given to the public." Cf. Newman, "Government and Ignorance—Progress Report on Publication of Federal Regulations", 63 Harvard L. R. 929.

But any arguments to the effect that the carriers here had the burden are academic since, if plaintiff here had the burden, plaintiff discharged it.

shippers." That latter finding, since it cannot be rationally inferred in the face of the specific finding of a "basic" fact, cannot stand up.[15] Dual rate provisions which authorize arbitrary differentials are obviously not reasonable.[16] For arbitrary conduct means unreasoned or unreasonable conduct, i.e., without reference to an adequate determining principle or standard;[17] and unreasonable discrimination is the equivalent of "unjust" discrimination.[18] Consequently, here the rates proposed to be charged shippers

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[15] Baltimore & O. R. Co. v. United States, 22 F. Supp. 533, 537 (per L. Hand, J.); Florida v. United States, 282 U. S. 194, 215; United States v. Caroline Carriers Corp., 315 U. S. 475, 489; United States v. Pierce Auto Lines, 327 U. S. 515, 533; United States v. Baltimore & O. R. Co., 293 U. S. 454, 463; United States v. Chicago, M. St. P. & P. R. Co., 294 U. S. 499, 506, 510-511; see also 5 U.S.C.A. Sec. 1007(b).

A discrepancy between the special finding of a basic fact and a finding of an ultimate fact may perhaps be compared with a discrepancy between a jury's answers to interrogatories and its general verdict. Cf. Orvis v. Higgins, 180 F. (2d) 537, 539 (C.A. 2), as to the resemblance between an administrative finding and a jury's special verdict.

[16] The plaintiff urges that the contract rates themselves are unreasonable since they are the rates established during World War II to cover unusual costs then existing. We need not, and do not, consider this contention.

In this connection, however, there may be noted Lough v. Outerbridge, 143 N. Y. 271, on which the Board relied in interpreting the statute. There, in 1894, before the statute, the court held that, in special circumstances, it was lawful for a water-carrier to grant lower rates to shippers making exclusive patronage contracts. But the court based its decision on the fact that there was an express finding by the trial court that the noncontract rates were reasonable, so that there was "no refusal to carry for a reasonable compensation," and no "detriment to the public by exacting unreasonable charges." The court said: "If the general rates are reasonable, a deviation from the standard by the carrier in favor of particular customers, for special reasons, not applicable to the whole public, does not furnish to parties not similarly situated any just ground for complaint. . . . Special favors in the form of reduced rates to particular customers may form an element in the inquiry whether, as a matter of fact, the standard rates are reasonable or otherwise."

[17] See e.g., United States v. Carmack, 329 U. S. 230, 243, and note 14; see also Zweig v. United States, 60 F. Supp. 785; In re Rogers, 47 F. Supp. 265, 266; United States v. Lotempio, 58 F. (2d) 358, 360; Fox Film Corp. v. Trumbull, 7 F. (2d) 715, 727.

[18] See, e. g., Mitchell v. United States, 313 U. S. 80, 94, 97; National Surety Corp. v. Mullins, 262 Ky. 465, 90 S. W. (2d) 707, 708.

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who do not sign contracts are unreasonably, and therefore unjustly, discriminatory; and the dual-rate provisions which permit such rates are invalid.

6. The Board's predecessors in some of their decisions have said that the validity of a dual-rate provision in a conference agreement is a question which must be determined by the facts in each case.[19] It may be urged, however, that some of those decisions contain intimations that sufficient facts exist to validate such a provision, as part of a conference agreement, if it appears merely that any carrier may join the conference and that the dual-rate provision will create "stability" by tending to drive competing non-conference carriers into the conference or out of business.[20] It is by no means clear that such administra-

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[19] Gulf International Contract Rates, 1 U.S.S.B., 524, 550; Phelps Bros. & Co., Inc. v. Cosulich-Societa, etc., 1 U.S.M.C. 634, 639.

[20] How much stability the particular dual-rate provisions in this case would furnish has been questioned. Without passing upon that question, we note the following: The examiner found, "With regard to the respondent carriers' obligations under the contract, the contract provided that respondents agreed to furnish the merchant at contract rates 'space in such vessels as they may respectively load at said loading ports for transportation and dispatch at the ports desired, provided that suitable unbooked space is available therein when the merchant makes application.'" This apparently means that, to a shipper who signs an exclusive patronage contract, the conference carriers agree to supply no transportation facilities, except as the conference members may see fit to provide them from time to time. Andrews, called by the carriers as a witness in the Board's hearing, testified that, if the conference carriers provided a contract shipper with no space, the contracting shipper would be free to ship via an independent, non-conference, carrier. But the very purpose of the dual-rate provision is, if possible, to compel independent shippers to join the conference or go out of business. If, then, the dual-rate provision is successful, there will be no independent carriers. In that event, a shipper who signs a contract will apparently receive only such carrying space as the conference members choose to supply. Plaintiff argues that this shows that the dual-rate provision will not assure "stability" to shippers.

The Board, in its opinion, intimated at one point that shippers endorsed the dual-rate provisions but, at another point, said: "The conferences realize that . . . something more than voluntary shipper cooperation must be agreed to. The dual-rate system is the device which has been developed for that purpose." It added: "Shippers have testified in this case that they deem the stability of rates and regularity of

tive interpretations, even if unambiguous, uniform and consistent, would be tenable, in the light of the provision in Sec. 814 as to unjustly discriminating provisions in conference agreements.[21] But we need not deal with that question. For (perhaps due to the way in which the statutory powers have been frequently shifted from one agency to another) the decisions of the Board (none of which approving a dual-rate provision has heretofore come to court) have lacked uniformity and consistency;[22] and, in

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service which a conference can offer are worth the price measured in terms of freight rates." However, two private shippers intervened in the Board's proceeding to protest against the dual-rate provisions in the agreements in suit. So, too, did the Secretary of Agriculture, as the representative of many other shippers; see infra.

[21] See, e.g., Neuberger v. Commissioner, 311 U. S. 83, 89; Koshland v. Helvering, 298 U. S. 441, 447; Alaska Steamship Co. v. United States, 290 U. S. 256, 264; United States v. Missouri Pac. R. Co., 278 U. S. 269, 280; United States v. Johnson, 173 U. S. 363, 378; Iselin v. United States, 270 U. S. 245, 251; United States v. Tanner, 147 U. S. 661, 663; United States v. Graham, 110 U. S. 219, 221; Webster v. Luther, 163 U. S. 331, 342. See annotations in 73 U. S. Law Ed. 339-343 and 84 U. S. Law Ed. 43-46.

[22] In Eden Mining Co. v. Bluefields Fruit & S. S. Co., 1 U.S.S.B. 41, decided in 1922, not long after the enactment of the statute, the Shipping Board held it unlawful as "unjustly discriminatory," for a carrier in foreign commerce to use the contract-noncontract device. Citing Secs. 16 and 17 (46 U.S.C. Secs. 815 and 816), the Shipping Board said; "It is evident that the purpose of Congress in enacting these provisions of the statute was to impose upon common carriers within the purview thereof the duty of charging uniform rates to all shippers receiving a similar transportation service. The duty of the respondent under these sections was to serve the public impartially, and we think the language used in W. U. Tel. Co. v. Call Pub. Co., 181 U. S. 92, in dealing with a similar statute, is entirely applicable to the case in hand. The court there said: 'All individuals have equal rights both in respect to service and charges. Of course such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon.' But that principle of equality does forbid any difference in charge which is not based upon difference in service, and, even when based upon difference of service must have some reasonable relation to the amount of difference and can not be so great as to produce an unjust discrimination.' From the facts of record in the case before us it is manifest that the transportation service furnished the complainants and contract shippers was in all respects identical." The Board also said: "It should be here remarked, however, that we do not decide whether under that act the ac-

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such circumstances, administrative interpretations have little weight.[23]

What is even more to the point, in each of the cases in which such intimations occurred, there was absent any specific finding, such as we have here, that the spread between the contract and non-contract rates, permitted by the dual-rate provisions, was arbitrary. As previously noted, in Rawleigh v. Stoomvart, 1 U.S.S.B. 285, the Shipping Board said that a dual-rate provision in a conference agreement is invalid if it authorizes a spread which is unlawful. In no subsequent decision by the Board, or by any of its predecessors, has that ruling been rejected. In the Rawleigh case, however, the Shipping Board sustained such a provision without considering the spread. But it did so only because, as the Board's opinion (p. 288) discloses, there the complainant had explicitly stated: "The question of

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cording of lower rates to those shippers who contract to confine their shipments to a certain carrier or carriers are lawful when based upon regularity of consignments, number of shipments, or quantity of merchandise furnished for transportation, as in the instant case no such question is presented for determination."

Some eleven years later, in Rawleigh v. Stoomvart, 1 U.S.S.B. 285, 290 (1933), it was indicated that the Eden rule applied exclusively to the case of a single carrier and was inapplicable to a conference agreement. However, some two years later, in Intercoastal Investigation, 1 U.S.S.B. 400, 452 (1935), the Shipping Board Bureau rejected this distinction. Then, some four years after that, in Contract Routing Restrictions, 2 U.S.M.C. 220, 226-227 (1939), the Maritime Commission cited the Eden case as applicable to a conference agreement. But now, eleven years after that case, the Federal Maritime Board, in the instant case, once more indicates that the Eden rule applies to the case of a single carrier only.

Again, Menacho v. Ward, 27 Fed. 529, has been variously treated: It was relied upon in the Eden case, supra (1922); treated as having been made irrelevant by the statute in Pacific Coast European Conference, 3 U.S.M.C. 11, 15-16 (1947); and, in the instant case, cited by the Board (1950) as authority in interpreting the statute.

[23] United States v. Missouri Pac. R. Co., 278 U. S. 269, 280; Burnet v. Chicago Portrait Co., 285 U. S. 1, 16; Alexander v. Cosden Co., 290 U. S. 484, 498; Estate of Sanford v. Commissioner, 308 U. S. 39, 49; American Surety Co. v. Bethlehem Bank, 314 U. S. 314, 319; United States v. Healey, 160 U. S. 136, 145; Merritt v. Cameron, 137 U. S. 542, 551-552. See annotations in 73 U. S. Law Ed. 345-349, and 84 U. S. Law Ed. 47-50.

rates from our viewpoint . . ., or the spread between them, is entirely immaterial and outside the scope of this proceeding." For that reason, the Board held (pp. 288, 293) that that particular proceeding "does not present for determination anything other than the lawfulness in the trade concerned of the contract-noncontract rate practice itself, apart from and independent of any factor of quantum of spread," and "involves no issue respecting anything other than the lawfulness of the contract rate practice per se." But the instant case is in that respect clearly distinguishable: Here the complainant proved before the Board that the spread was not reasonable; the Board, by its supplemental order, directed the examiner to rule upon findings of fact proposed by the complainant; the examiner, in conformity with that direction, explicitly found that the differential between the rates was arbitrary; and the Board has adopted that finding.

7. It might conceivably be suggested that, nevertheless, the Board properly ignored the unreasonableness of the spread, authorized by the dual-rate provisions, because plaintiff, before the Board, attacked the dual-rate provisions not for such unreasonableness, but on the sole ground that they are unlawful per se under Sec. 812, Third. However, plaintiff, before the Board, did inject the issue of the authorized spread by requesting the finding as to the arbitrariness of the differential.

There is this further consideration. In United States Navigation Co. v. Cunard S. S. Co., 50 F. (2d) 83, 89 (C.A. 2), the court, interpreting Sec. 814, said: "The Board shall approve such agreements as it does not find 'to be unjustly discriminatory or unfair.'" In oral argument before us, counsel for the Board seemed to suggest a different interpretation, i.e., that at least in initially approving a conference agreement under Sec. 814, the Board has no obligation whatever to inquire into unjust or unfair discrimination; need make no finding on that score; and, only if it does choose to inquire and also does choose to find unjust or unfair discrimination, need it disapprove or modify the agreement on that ground. This is a somewhat surprising contention, to be contrasted with the following views of

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Commissioner Aitchison of the Interstate Commerce Commission concerning the obligations of administrative agencies: "They are not expected merely to call balls and strikes, or to weigh the evidence submitted by the parties and let the scales tip as they will. The agency does not do its duty when it merely decides upon a poor or nonrepresentative record. As the sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in. . . . The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible . . ."[24]

Even if, however, the interpretation seemingly suggested by the Board's counsel were correct, it would have no pertinence in this case. For it seems plain that here the Board, in a complaint proceeding under 46 U.S.C. Sec. 821, having actually found the authorized spread arbitrary, had the duty, of its own motion, to hold the dual-rate provisions unlawful, because they authorize such a spread. See Baltimore & O. R. Co. v. United States, 22 F. Supp. 533, 537 (per Judge L. Hand).[25]

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[24] Senate Subcommittee Hearings on S. 674, S. 675 and S. 918, April 29, 1941, pp. 465-466.

The Supreme Court has admonished that, in court review of orders of Boards and Commissions, the public interest looms large. See F.C.C. v. Sanders Bros. Radio Station, 309 U. S. 470, 475; Scripps-Howard Radio v. F.C.C., 316 U. S. 4; F.C.C. v. N.B.C., 319 U. S. 239, 247; Ashbacker Radio Corp. v. F.C.C., 326 U. S. 327. See also W. R. Grace & Co. v. Civil Aeronautics Board, 154 F. (2d) 271, 286 (C.A. 2); Associated Industries v. Ickes, 134 F. (2d) 694 (C.A. 2).

[25] In his initial report, the trial examiner pointed out "certain possible violations of law" including one instance when, "at the request of the Automobile Manufacturers Association, the effective date of the contract period in the eastbound trade was postponed for the Association's members from November 1 to December 31, 1948, and the members were to get the lower contract rates during that period even though they had not

Nor can it be successfully maintained that plaintiff's complaint, in this court, is not broad enough to support our decision.[26]

8. Were it urged that the complainant, as a carrier, has no standing to complain of unlawful discrimination between shippers, the short answer (all else aside) would be that the Department of Agriculture, an intervenor in the Board's proceeding, is itself a shipper, and spoke for many other shippers of agricultural commodities. The Agricultural Marketing Act of 1946, 7 U.S.C. 1946 ed. Sec. 1622(j), authorizes the Secretary of Agriculture "To assist in improving transportation services and facilities and in obtaining equitable and reasonable transportation rates and services and adequate transportation facilities for agricultural products and farm supplies by making complaint or petition to . . . the Maritime Commission . . . with respect to rates, charges, tariffs, practices and services . . ." An expert of the Department of Agriculture gave testimony before the examiner showing the movement of 1,027,253 tons of a wide range of agricultural commodities in the trade here involved, from July 1, 1947, to June 30, 1948; and that, for the shipments on which the ocean rates on the commodities were named in cents per one hundred pounds, freight charges of $5,323,778.50, based on the Conferences' present rates or proposed exclusive patronage contract rates would be assessed as against $6,406,671.50, based on their proposed higher noncontract rates, or a difference of $1,082,893. This tonnage represents approximately 10 percent of the total products of agriculture exported annually.[27]

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signed contracts, a possible unwarranted discrimination against all other shippers." He made no recommendation with respect to this occurrence, nor did the Board, as he suggested, "see fit to investigate it," or even discuss it.

[26] F.R.C.P. 54(c); Truth Seeker Co. v. Durning, 147 F. (2d) 54, 56 (C.A. 2); Matorose v. Moore McCormack Lines, 158 F. (2d) 631, 633 (C.A. 2); Gins v. Mauser Plumbing Supply Co., 148 F. (2d) 974, 976 (C.A. 2).

[27] The Department of Agriculture owns or controls great quantities of farm products, substantial portions of which have been and will continue to be exported through our North Atlantic ports to Belgium, The Nether-

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9. It has been argued that, since the dual-rate provisions authorize an arbitrary spread and are thus unjustly discriminatory, they also fall foul of the third subdivision of Sec. 812, prohibiting retaliation by a carrier because a shipper has "patronized any other carrier". But, for reasons previously canvassed, we think it unnecessary to decide that issue.

10. To summarize: The conference carriers, acting pursuant to the dual-rate provisions, proposed to put into effect contract and noncontract rates with a spread between the two, which spread the Board found to be arbitrary. We decide that the dual-rate provisions, since they permit an arbitrary spread, are invalid. Our order will therefore provide that the Board's order be set aside, and that the defendants be enjoined from acting pursuant to the dual-rate provisions.

The motions to dismiss are denied. A final injunction will issue.

This opinion is hereby substituted for this court's earlier opinion, dated January 25, 1951, which is hereby recalled and vacated.

JEROME N. FRANK,
Circuit Judge;

SYLVESTER J. RYAN,
District Judge;

SAMUEL H. KAUFMAN,
District Judge.

March 20th, 1951.

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lands and Germany. This direct interest of the Secretary has been especially vital in recent years because of the far-flung rehabilitation programs of the Federal Government under the Economic Cooperation Act and the Military Government Relief in Occupied Areas. The Department is one of the largest shippers in foreign commerce.

Appendix by Judge Frank

The briefs and oral arguments were devoted principally to contentions concerning the meaning and applicability of 8 U. S. C. Sec. 812(3),[28] but the court has reached its decision without reference to that subsection.

I deem it desirable, however, to set forth, in this appendix, the arguments, pro and con, as to that subsection, which were advanced by the parties before this court or which occurred to any members of this court, but *without expressing an opinion as to the cogency of those arguments.* See W. R. Grace Co. v. Civil Aeronautics Board, 154 F. (2d) 271, 282-285 (C. A. 2), for a previous use of such an appendix. My colleagues, Judges Ryan and Kaufman, regard such an appendix as superfluous and undesirable. I therefore take the sole responsibilitiy for it.

1. The Board argues that Sec. 812(3) must be read in the light of the paramount purpose of Sec. 814. The Board maintains that Sec. 814 authorizes carriers to enter into a conference agreement (a) which obliterates competition in rates among those carriers who become parties to the agreement and (b) which also contains provisions having the effect or tendency of destroying outside competition, i. e., competition between (1) the conference carriers as a group and (2) independent carriers, by forcing the independents either to join the conference or (sooner or later) to go out of business. In other words, Congress in Sec. 814 authorized combinations which can coerce all carriers (in any given trade) into accepting non-competitive rates.[29]

In support of this interpretation, there is cited the language of Sec. 814 that carriers' agreements may provide for "destroying competition," and exempting those making such agreements from the anti-trust laws. It is then argued that an interpretation of Sec. 812 which would deny a conference the use of any devices whatever that destroy rate competition by independent carriers would nullify the intent of Sec. 814. Accordingly, as exclusive

[28] For convenience, the subdivisions of Sec. 812 are cited as (1), (2), (3) and (4).

[29] See footnote 13, quoting from the Board's brief.

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patronage contracts with shippers help to carry out that intent, Sec. 812(3) must be construed as not forbidding a conference to use such contracts.

2. The following answers to these arguments have been urged:

Repeals by implication of statutes—especially of the anti-trust laws—are not favored. See U. S. v. Borden, 308 U. S. 188, 198-199.[30] The purpose of Sec. 814 was merely to exempt from the anti-trust laws agreements destroying, or substantially reducing, competition among those carriers who choose to join a conference. The first three subdivisions of Sec. 812 were intended (inter alia) to prohibit the use of all methods which would coerce an independent carrier, under threat of financial ruin, to become a member of a conference, thereby destroying rate competition between (1) independents and (2) the conference, to the grave injury of American shippers. This appears from the following:

Section 812(1) forbids "deferred rebates"; Sec. 812(2) forbids "fighting ships" to be used "for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade"; Sec. 812(3) forbids any carrier to "retaliate" against any shipper either "by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier . . ." Since the admitted tendency or effect of exclusive patronage contracts is fully as deadly as deferred rebates or fighting ships in wiping out competition between a conference and independents, Congress could not have intended to authorize a conference to use such contracts. The Board's interpretation of Sec. 812(3) would poke a wide hole in the dike erected by Congress against the creation of cartels free of outside competition. That interpretation would work a repeal by mere implica-

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[30] There the Court, rejecting a contention that a part of the anti-trust laws had been repealed by implication, said: "We cannot believe that Congress intended to create 'so great a breach in historic remedies and sanctions.'"

tion, of the anti-trust laws, far beyond the express and limited repeal contained in Sec. 814.

Competition is cherished by the common law (and safeguarded by the anti-trust laws) in large part for the purpose of protecting consumers from unreasonably high prices or rates likely to result from monopoly or unreasonable restraint of trade. Therefore, whenever any of our governments has, by statute, insulated anyone from all competition in the same industry—as, for example by a grant of an exclusive franchise—it has coupled the grant with the establishment—as a substitute for competition as a price-regulator—of a governmental agency empowered to fix reasonable maximum prices or rates. A legally sanctioned complete monopoly, minus such regulation, is virtually unprecedented.[31]

This traditional policy of rate regulation was fully recognized by the House Committee which in 1914, in the so-called Alexander Report,[32] made recommendations that led to the Shipping Act of 1916. That Report (pp. 420-421) recommended that the Interstate Commerce Commission be authorized to investigate the rates of all carriers, including those in foreign commerce, and to order their "rates changed if convinced that the rate under consideration is unreasonably high." The Report explained this recommendation by saying that "the Committee feels that in the absence of governmental control steamship combinations may in many instances have it within their power to arbitrarily raise rates to an unreasonable degree both as regards the general level and in the case of particular commodities. . . . (The) purpose of the law should be to protect the shipper against any unreasonably high rate which the combination lines may have within their power, by virtue of their agreements and conference arrangements, arbitrarily to impose in the absence of government supervision and control." Congress partly accepted this recommendation, in Sec. 817, by there giving the Shipping Board (now the Federal Maritime Board) the express power to

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[31] Patents, copyrights and trade-names are unusual and exceptional.

[32] H. R. Doc. 805, 63d Cong., 2d Sess. —.

order just and reasonable maximum rates with respect to interstate water-carriers. But Congress omitted any such provision as to carriers in foreign commerce; as to such carriers there is only the statutory power to forbid discrimination in rates.

Congress could not have intended to authorize such cartels, engaged in foreign commerce, as the Board here has attempted to approve. For the evidence shows that the conference agreements here involved provide that the rates named in the agreements cannot be changed—up or down—without the consent of every single member of the conferences; and a considerable majority of the members are foreign-owned carriers. If the exclusive patronage provisions were valid, and if they effectively achieved their purpose of putting out of business all carriers who refuse to join the conferences, then, with no governmental agency having power to impose maximum rates, American shippers would be entirely at the mercy of foreign-owned carriers, which could maintain rates no matter how unreasonably high.

Sections 812(3) and 814, it is said, must be read against this background. Section 814 provides that the Board is not to approve a conference agreement "in violation of this Act," and, of course, Sec. 812(3) is part of the Act. Stress is laid upon the fact that the word "discriminating" in Sec. 812(3) is unqualified by any adjective, and that this is in striking contrast with (a) Sec. 812(4), which speaks of "any unfair or unjustly discriminatory contract," (b) Sec. 814 which uses the words "unjustly discriminatory," (c) Sec. 815 which contains the phrase "undue or unreasonable preference or advantage . . . or . . . prejudice or disadvantage, and (d) Sec. 816 where "discriminatory" is preceded by "unjustly". Consequently, Sec. 812(3) forbids any carrier to resort to any discrimination whatever—whether or not "unjust" or "undue" or "unreasonable"—as against a shipper for patronizing another carrier. Wherefore, exclusive-patronage contracts are unlawful per se.

See Baltimore & O. R. Co. v. United States, 22 F. Supp. 533, 538, where Judge Learned Hand said: "Subdivision

1, as amended, 49 U. S. C. A. Sec. 3(1), generally forbids a carrier to discriminate unduly or unreasonably in any way between one person, 'locality, port, port district, gateway, transit point' and another. It does not, and could not, impose a peremptory prohibition in such cases; the discrimination must be 'undue or unreasonable'; discriminations are not per se unlawful, their occasion must be examined. That is not true of discriminations under subdivision three, which *is* peremptory, and admits no excuses; carriers must not discriminate in rates between connecting lines."[33] See also Hocking Valley R. Co. v. U. S., 210 Fed.

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[33] The Court was interpreting 49 U.S.C. Sec. 3 which read as follows:

"(1) It shall be unlawful for any common carrier subject to the provisions of this Act to make, give or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic . . . or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

"(2) No carrier by railroad subject to the provisions of this Act shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination: Provided, That the provisions of this paragraph shall not be construed to prohibit any carrier from extending credit in connection with rates and charges on freight transported for the United States . . . for any State or Territory or political subdivision thereof, or for the District of Columbia. . . .

"(3) All carriers engaged in the transportation of passengers or property, subject to the provisions of this chapter, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper. . . ."

Referring to the last clause of 49 U.S.C. Sec. 3(3) which read "Or unduly prejudice any such connecting line in the distribution of traffic that

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735, 745 (C. A. 6); L. & N. R. Co. v. Mottley, 219 U. S. 467, 478.

If the Shipping Act were given the Board's interpretation, it would probably be unconstitutional. For then it would confer upon a conference, a private cartel, the power to exclude an independent carrier from trade unless the independent joins the conference and accepts its terms; this would be the equivalent of granting a private cartel the power to issue certificates of convenience and necessity, with no statutory criteria to guide their issuance. The statute so construed would, at least, verge on unconstitutionality. A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 537; cf. Fashion Organizators' Guild v. F. T. C., 312 U. S. 457, 465. Such an interpretation should, if possible, be avoided.

3. To these arguments, the Board replies thus:

(a) The Board has power to prescribe maximum reasonable rates for conferences of carriers engaged in foreign commerce. For, under Sec. 814, the Board may disapprove, cancel or modify any conference agreement if the Board finds the agreement "to operate to the detriment of the commerce of the United States." The Board's predecessors—once in 1935 and twice in 1939—have stated, in opinions, that this language confers power to withdraw approval of conference agreements among carriers engaged in foreign commerce, upon a showing that a conference

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is not specifically routed by the shipper," the court said: "The discrimination here in question was not really between carriers, but between localities. Of course it is literally true that there cannot be a discrimination between localities without an incidental discrimination between connecting carriers where the localities can only be reached by connecting lines; but for that very reason we should avoid any redundancy. There is some confirmation of this in the last clause of subdivision three, because, although the adverb, 'unduly,' is there introduced, the prohibition appeared to have in mind alternative routes between the same termini. That is what we think this part of subdivision three covers; no general inquiry is necessary beyond that of the two alternative routes. We do not believe that the problem of comparative rates between two localities can be so simplified."

rate is unreasonably high, since such a rate is detrimental to the commerce of the United States.[34]

(b) If Sec. 812(3) applies at all to conference agreements, the word "discriminating" in that section must be read as "unjustly discriminating," in order to harmonize it with Sec. 814.

(c) But Sec. 812(3) is inapplicable to agreements under Sec. 814. For Sec. 814 authorizes agreements "giving special rates." Moreover, while Sec. 812(1) forbids "deferred rebates," including those by a "combination," and Sec. 812(2) prohibits the use of a "fighting ship either separately or in conjunction with any other carrier," Sec. 812(3) does not similarly refer to joint action.

(d) In any event, the word "retaliate" in Sec. 812(3) means solely conduct that penalizes a shipper for past conduct in patronizing another carrier. The word must be read in the light of Menacho v. Ward, 27 F. 529 (1886) which held illegal increased rates to shippers because they had previously shipped by a competing carrier. Section 812(3) is a codification of the ruling in that case. Moreover, the non-contract rate here is not a retaliation, since it is charged a shipper who does not sign a contract, regardless of whether or not he patronizes an independent carrier.

(e) Although the Alexander Report recognized the then prevailing use of "deferred rebates" and of "fighting ships", as well as of exclusive patronage contracts, nevertheless the Report recommended the prohibition of the first two practices but did not recommend prohibition of such contracts. Congress adopted the Board's recommendations. Therefore, Sec. 812(3) was not intended to forbid such contracts. In a footnote to Swayne & Hoyt Ltd. v.

[34] See Edmund Weil v. Italian Line "Italia," 1 U.S.S.B. 395 (1935); In the Matter of Rates, Charges, Rules, Regulations, and Practices of the Common Carriers Parties to the Pacific Coast River Plate Brazil Conference Agreement, 2 U.S.M.C. 28 (1939); Pacific Forest Industries v. Blue Star Line, Ltd., 2 U.S.M.C. 54 (1939).

The Board's predecessors have held that 46 U.S.C. Sec. 817 is inapplicable to a foreign commerce conference. See Boston Wool Trade Assn. v. General Steamship Co., 1 U.S.S.B. 49, 51 (1923); cf. Seas Shipping Co. v. American-South African Lines, 1 U.S.S.B. 568, 579 (1936).

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United States, 300 U. S. 297, 307, the Court referred to the Alexander Report as recognizing that conference agreements providing for such contracts might, in some circumstances, be valid.[35]

(f) The dual-rate system is not the equivalent of giving the conferences power to issue certificates of convenience and necessity. There is, said the Board in its opinion here, "* * * no evidence that the dual-rate system * * * will * * * effectively cause the exclusion of an independent carrier from any trade route on which he wishes to operate."

4. The following are suggested answers to the Board's contentions summarized in point 3:

(a) The words "detriment of the commerce of the United States" in Sec. 814 are far too vague to empower the Board to establish reasonable maximum rates for foreign commerce conferences, since those words are in significant contrast with the very specific provision, as to maximum rates of interstate carriers in Sec. 817, which was enacted at the same time as Sec. 814.

The statements, in the cited cases, by the Board's predecessors, that Sec. 814 confers powers to fix foreign commerce conference maximum rates, were but dicta, since in those cases the Board did not exercise that power. Nor,

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[35] That footnote reads: "The report of the House Committee on Merchant Marine & Fisheries, H. R. Doc. 805, 63d Cong., 2d Sess. (1914), recommended the prohibition of deferred rebates, adopted in Sec. 14 of the Shipping Act, because it operated to tie shippers to a group of lines for successive periods, and because the system 'is unnecessary to secure excellence and regularity of service, a considerable number of conferences being operated today without this feature.' See, e.g. pp. 103-105, 200. The Committee recognized that the exclusive contract system does not necessarily tie up the shipper as completely as 'deferred rebates,' since it does not place him in 'continual dependence' on the carrier by forcing his exclusive patronage for one contract period under threats of forfeit of differentials accumulated during a previous contract period. Accordingly the Committee did not condemn the contract system completely. Cf. W. T. Rawleigh Co. v. Stoomvaart, 1 U.S.S.B. 285. The policy of the statute may properly be applied where, as in the circumstances of this case, the contract system must be taken as actually operating to effect a monopoly. Cf. Eden Mining Co. v. Bluefields Fruit & S.S. Co., 1 U.S.S.B. 41."

in the thirty-four years (1916-1950) since the statute was enacted, has the Board ever attempted to fix such maximum rates.[36]

Counsel for the conference carriers said, in oral argument, that it would never be feasible for the Board to disapprove of foreign commerce conference agreements, when tendered to the Board for approval, on account of unreasonably high rates, because a Board investigation, conducted at that time, into the reasonableness of such rates would be fruitless, and would preclude approval, as conditions affecting rates in foreign commerce fluctuate rapidly. He intimated that the Board could subsequently modify or abrogate such a conference agreement, previously approved, because of unreasonably high rates. But he did not explain why, since conditions would then also be fluctuating, it would then be more feasible for the Board to investigate and fix reasonable maximum rates.

A recent Report by a Senate Sub-Committee[37] states: "Rates in the foreign trade cannot be subject to the direct control of the Government. They are set through the medium of conference agreements between the American and foreign operators in each particular service;" and adds that "discipline in the matter of rates" in foreign commerce "was nearly impossible by our government" and that only "conference discipline"—i.e., concurrence by members of the conferences—can keep rates reasonable. There is, then, no efficacious governmental power to compel reasonable rates in the case of foreign-trade conference carriers.

(b) Section 812(3) does apply to joint action, since Sec. 812 begins with a clause relating to what a carrier does "directly or indirectly". In Pacific Forest Industries v. Blue Star Line, Ltd., 2 U.S.M.C. 54, 57, the Maritime Commission said: "There is testimony to the effect that the conference threatened to deny complainant space unless it agreed to the increased rates. This is denied by

[36] Counsel for the Board, in a letter to this court, said that "there are no decisions of the Board or its predecessors which imposed maximum rates on conference carriers engaged in foreign commerce."

[37] Senate Report 2494, 81st Cong., 2d Sess., pp. 84-85.

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conference witnesses. Such retaliation would be a misdemeanor under the act for which a severe penalty is provided." Thus the Board's predecessor recognized that Sec. 812(3) applies to a conference.

(c) The authorization in Sec. 814 of provisions for "special rates" does not sanction such rates if used to penalize a shipper for patronizing another carrier, for that practice is explicitly made unlawful in Sec. 812(3).

(d) "Retaliate" in Sec. 812(3) does not relate exclusively to conduct penalizing past acts of a shipper: The lex talionis served as a warning of the consequences of future misdeeds. "Retaliatory statutes" look to the future.[38] So, too, does Sec. 812(3) in the phrase "threatening to refuse." There is no basis for the assertion that Sec. 812(3) was intended merely to "codify." Menacho v. Ward, 27 F. 529.[39]

Answering the Board's argument that there is here no retaliation since the noncontract rate is charged a shipper who does not sign a contract, regardless of whether or not he patronized an independent carrier, it is noted that the higher rate is charged a shipper who does sign a contract and who then patronizes an independent: in such a situation the higher rate is exacted for the shipper's conduct which is past conduct at the time of such exaction.

(e) The Alexander Report did not approve exclusive patronage contracts. Referring to "deferred rebate systems" as "objectionable," it said (p. 307): "By deferring the payment of the rebate until three or six months following the period to which the rebate applies, ship-owners effectively tie the merchants to a group of lines for successive periods. In this connection *it is argued*[40] that the ordinary contract system does not place the shipper in the position of continual dependence that results from the deferred rebate system." More important, Congress significantly deviated from the Report's recommendation. The Report (p. 421) recommended that "all carriers should

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[38] See 14A C. J. 1268-1270; 20 C.J.S. 44-45.

[39] See footnote 22 as to the inconsistent position of the Board and its predecessors concerning the significance of Menacho v. Ward.

[40] Emphasis added.

be prohibited from retaliating against any shipper by refusing space accommodations when such are available, or by resorting to other unfair methods of discrimination, because such shipper has patronized an independent line, or has filed a complaint charging unfair treatment, or for any other reason." This recommendation was before the Committees which, in the next session, brought out (July 18, 1916) the Bill which became the 1916 Act. See 64th Cong. 1st Sess., Sen. Report No. 689, pp. 10-11. But the Bill and the Act importantly departed from the recommendation of the Alexander Report: Sec. 812(3) substituted, for the recommended words "other unfair methods of discrimination," the words "other discriminating or unfair methods." And this change was concomitant with another deviation from the Alexander Report by which Congress inserted "unfair or unjustly discriminatory" in Sec. 812(4)—thus showing that it knowingly and deliberately deleted "unfair" in Sec. 812(3).

The footnote in Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, is at best, dictum, for the Court there affirmed an administrative decision which had disapproved an exclusive patronage provision as unduly discriminatory under Secs. 815 and 816, so that Sec. 812(3) was not before the Court. Moreover, the body of the court's opinion, which said that the operation of an exclusive contract system "does not differ substantially from that of deferred rebates," is somewhat inconsistent with the footnote. In addition, although the Court in the footnote referred to the Alexander Report, it did not have its attention directed to the fact that Congress had importantly deviated from the Report's recommendations.

(f) It does not answer the certificate-of-convenience argument to say that the dual-rate provisions will not exclude an independent carrier from any trade route on which he wishes to operate. For as the Board states in its brief (see footnote 13 supra), such exclusion will result if the dual-rate provisions work successfully.

(g) The Attorney General advanced the following contention: The exemption in Sec. 814 from the anti-trust laws is specifically restricted to an "agreement" by a car-

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rier "with another such carrier or other person subject to this chapter"; a shipper, under Sec. 801, is not an "other person subject to" this Chapter; consequently the exemption does not include a contract between a conference and a shipper. In support of this argument, it is noted that the Alexander Report recommended that Commission approval be required not only of agreements between carriers but also of carriers' contracts with shippers, but that, in enacting Sec. 814, the recommendation as to contracts with shippers was omitted.

5. It is suggested that an exclusive-patronage provision in a conference agreement will not violate Sec. 812(3) if that provision has a clearly legitimate economic purpose and effect other than that of either penalizing shippers for patronizing non-conference carriers or creating a cartel free of competition from such independent carriers. This suggestion has these variants: (a) Such a provision is lawful if, and only if, the Board, on the basis of substantial evidence, finds that the "spread" between the contract and noncontract rates is reasonable. (b) Such a provision is lawful if, and only if, in addition to (a), the Board, on the basis of substantial evidence, finds that the noncontract rates are not unreasonably high.[41]

I repeat that I express no opinion as to the cogency of any of the foregoing arguments.

The reasons which led to the adoption of this Congressional policy are set forth in full in the Alexander Committee Report, H. R. Doc. 805, 63 Cong., 2nd Sess., which was issued prior to the Shipping Act, 1916, and on which the latter was largely patterned. The Committee recognized that conditions of ocean transportation were such as to permit recurrent rate wars, which disorganized service, impaired its quality, permitted discrimination

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[41] Cf. the discussion in footnote 16 of Lough v. Outerbridge, 143 N. Y. 271.

The examiner in this case stated that there was no evidence as to the reasonableness of the two types of rates. Nor did the Board find the contract rates reasonable. As stated in footnote 16, plaintiff urges that the contract rates are unreasonably high, since they are the rates established during World War II to cover the then prevailing and unusually high costs.

against small shippers, discouraged "forward trading" by merchants, and ultimately resulted in monopoly through the process of extermination or absorption of the weaker units by the stronger (Report 295-303; 416), and stated, p. 416,

> "It is the view of the Committee that open competition can not be assured for any length of time by ordering existing agreements terminated,"

and further observed, p. 298,

> "the conference system largely results in placing rates outside the influence of competition."

Coming now to the provisions of the contracts, there is little difference between the eastbound and the westbound form. The eastbound contract provides that the shipper ("Merchant") shall ship by the conference lines "all shipments of the commodities mentioned (or provided) below"; that "failure so to tender any such shipments to the carriers, or shipment of them by vessels other than those of the carriers shall be a violation of this contract"; that the carriers agree to transport the shipments on their vessels; that if the carriers fail to name space within three days after the shipper applies therefor, the shipper shall be free to secure space elsewhere without prejudice to the contract, but the shipper must first give the conference an opportunity to arrange space; that the carriers agree to furnish "space in such vessels as they may respectively load"; that if the shipper shall make shipment in violation of the contract the carriers "shall have the option at any time to declare this agreement terminated, and the Merchant shall be liable to the carriers for liquidated damages equal to twice the amount of freight that would have been payable under this contract in respect of the shipments constituting the violation"; that "other commodities as may be shipped by the Merchant from time to time, which shall be deemed covered by this agreement," shall be at the lowest rates then in effect for the particular commodity; that rates are subject to reasonable increase from time to time, and that the notice thereof shall be deemed accepted

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by the shipper unless, within 20 days after his receipt of the notice, he gives the carriers written notice of non-acceptance, in which case the carriers shall have the option at any time within 20 days after receipt of the shipper's notice to cancel the agreement on giving the shipper at least 60 days' written notice; that the carriers shall have the option to reduce their rates, the shippers in such case to receive the benefit thereof; and that the agreement shall continue in effect throughout consecutive subsequent years subject to the right of either the shipper or the carriers to terminate it as of December 31 in any year by giving the other party 90 days' written notice of termination.

The testimony showed that by practical operation the contract shipper was guaranteed against a change of rate for at least 80 days.

Our function in this proceeding is to re-examine the dual rate system to determine whether it violates any express statutory provisions, or if not, whether it contains any elements which violate statutory standards so as to require administrative disapproval.

The gist of Isbrandtsen's argument is that the system violates statutory provisions in that it sets up dual rates for the same service and thereby necessarily creates *discrimination* between those shippers who sign and those who refuse. Isbrandtsen claims that it makes no difference that such discrimination may not be *unreasonable* or *unjust*, contrary to the requirements of sections 15, 16, and 17 of the Act. It points out that the language of section 14 (3) of this Act, unlike that of the other sections referred to, outlaws not only *unreasonable* discrimination but *all* discrimination. Relying on dicta of the Supreme Court in *Swayne & Hoyt, Ltd.* v. *U. S.*, 300 U. S. 297, complainant concludes that a *prima facie* case of discrimination has been made out, which may not be excused on any showing of reasonableness.

Section 14 (3) of the Act reads as follows,

> "That no common carrier by water shall, directly or indirectly, * * *
>
> "Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when

such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason."

It is to be noted that the modifying words "unjust" or "unreasonable" do not appear before the word "discriminating" in this section, as they do in the other sections referred to, although the word "unfair" follows immediately after. Nevertheless, we cannot agree that this section has the effect which Isbrandtsen claims. For this there are several reasons: first, such an interpretation would be contrary to the interpretations which our predecessors have uniformly given since the adoption of the Act in 1916; secondly, such an interpretation would make impossible any harmonious administration of the Act as a whole; thirdly, such construction would extend the application of section 14 (3) to carriers' activities generally, whereas we think application is limited to such retaliation as is there described.

APPENDIX "B"

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 47-749

ISBRANDTSEN CO., INC., *Plaintiff*,

vs.

UNITED STATES OF AMERICA, NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE, et al., *Defendants*,

FEDERAL MARITIME BOARD and UNITED STATES DEPARTMENT OF AGRICULTURE, *Intervenors*

Final Order

This cause, having come on to be heard,
It is ordered

1. That defendants, North Atlantic Continental Freight Conference, Continental North Atlantic Westbound Freight

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Conference, and the defendant carriers, members of said two Conferences, their officers, agents, servants, employees and attorneys are hereby perpetually enjoined from taking any steps to execute or effectuate, directly or indirectly, any contracts with shippers containing the contract/non-contract dual-rate system, pursuant to the contract/non-contract provisions of conference agreements numbered 4490-6 and 7920-1 and heretofore proposed to be effectuated by said Defendants in the North Atlantic Trades, on November 1, 1948.

2. That the Order of the Federal Maritime Board dated December 1, 1950 is set aside.

3. That the motions to dismiss the amended complaint are denied.

4. That the motion of defendant carriers to strike the answer to the amended complaint filed by defendant, United States of America, is denied.

5. That plaintiff recover its taxable costs from the defendant Conferences and Carriers, jointly or severally, including the costs of the premiums paid on all bonds heretofore filed by plaintiff as a condition of the granting of the temporary restraining order and the preliminary injunction, both heretofore issued by this Court. Said bonds are hereby vacated and discharged.

Dated: March 20, 1951.

Entered: March 21st, 1951.

JEROME N. FRANK,
United States Circuit Judge.

SYLVESTER J. RYAN,
United States District Judge.

SAMUEL H. KAUFMAN,
United States District Judge.

Bill of costs taxed in the sum of $1895.60 April 5, 1951 (Plaintiff).

Judgment entered:

WILLIAM V. CONNELL,
Clerk.

Apr. 5-1951

APPENDIX "C"

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 47-749

ISBRANDTSEN CO., INC., *Plaintiff*,

vs.

UNITED STATES OF AMERICA, NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE, et al., *Defendants*,

FEDERAL MARITIME BOARD and UNITED STATES DEPARTMENT OF AGRICULTURE, *Intervenors*

Defendants North Atlantic Continental Freight Conference, Continental North Atlantic Westbound Freight Conference, et al. and defendant Federal Maritime Board having moved for reconsideration of this Court's decision in the above-entitled action,

It is ordered

That the motions for reconsideration be and they are hereby denied.

Dated: March 20, 1951.

Entered: March 26, 1951.

JEROME N. FRANK,
United States Circuit Judge.

SYLVESTER J. RYAN,
United States District Judge.

SAMUEL H. KAUFMAN,
United States District Judge.

APPENDIX "D"

FEDERAL MARITIME BOARD

No. 684

ISBRANDTSEN COMPANY, INC.

v.

NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE et al.[42]

Submitted October 18, 1950. Decided December 1, 1950

The proposed exclusive patronage contract dual rate system of North Atlantic Continental Freight Conference and of Continental North Atlantic Westbound Freight Conference are not in violation of the Shipping Act, 1916, or in contravention of section 15 thereof.

A provision of a conference contract with the shipper, giving the carrier an option to declare the contract terminated if the shipper violates the contract by shipping via a nonconference vessel, is unjustly discriminatory and should be eliminated from the contract.

Complaint dismissed.

John J. O'Connor and William L. McGovern for complainant.

Roscoe H. Hupper and Burton H. White for respondents.

Joseph E. McDowell for United States Department of Justice, Henry A. Cockrum for United States Department of Agriculture, Hymen I. Malatzky for Himala International, and E. A. McDonald, Jr., and T. R. Stetson for Pacific Coast Borax Co., interveners.

Paul O. Page, Jr., Solicitor, and George F. Galland for the Board.

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[42] Continental North Atlantic Westbound Freight Conference, A/S J. Ludwig Mowinckels Rederi, Black Diamond Steamship Corporation, Compagnie Generale Transatlantique, Compagnie Maritime Balge, Cunard White Star, Ltd., Ellerman's Wilson Line, Ltd., Dampskibsselskabet af 1912 A/S, A/S Dampskibsselskabet Svendborg, United States Lines Company, N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, Waterman Steamship Corporation, and South Atlantic Steamship Line, Inc.

Report of the Board

By the Board:

The complainant, hereinafter called "Isbrandtsen", originally brought suit in the District Court of the United States for the Southern District of New York, seeking to restrain the respondents, who constitute, respectively, the eastbound and westbound North Atlantic conferences, from putting into effect the so-called exclusive patronage contract, hereinafter referred to as the "contract", providing for contract and non-contract rates, hereinafter referred to as the "dual rate system", and seeking to set aside so much of certain orders of the United States Maritime Commission, our predecessor, as purported to authorize the dual rate system. The Commission's orders had been issued from time to time after investigation, but without adversary proceedings, approving the agreements of the two conferences and various amendments thereto, all pursuant to section 15 of the Shipping Act, 1916, hereinafter referred to as the "Act".

The original eastbound conference Agreement No. 4490 provided that the dual rate system might be negotiated with shippers. The original westbound conference Agreement No. 7000 failed to make mention of such system, but by amendment set forth in Agreement No. 7920-1, approved by the Commission, the system was authorized.

It appearing to the District Court that the conference carriers were about to put the dual rate system into effect and thereby require shippers to contract to employ conference carriers exclusively in order to secure tariff rates lower by 20 per cent than those applicable if they failed so to contract, a temporary injunction was issued by the court on January 7, 1949, in order to preserve the *status quo*, on condition that Isbrandtsen should, within 20 days from the entry of the order, prosecute before the Maritime Commission a complaint challenging the validity of the dual rate system.

Thereafter, the present proceeding was instituted by Isbrandtsen, praying that so much of the conference agreements above mentioned as purported to authorize the system be revoked, and that the two conferences cease and

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desist from putting the system into effect. The Department of Justice, the Department of Agriculture, and certain individuals intervened, and counsel for the Board participated in the proceeding.

Isbrandtsen and the Department of Justice have made it clear to this Board and to the Maritime Commission, which will hereinafter collectively be referred to as the "Board", that they do not challenge the validity of the conference agreements generally, but only the dual rate system. Specifically, Isbrandtsen claims (1) that the system is illegal, because in violation of section 14(3) of the Act, hereinafter quoted, and (2) that the Board may not, under section 15 of the Act, legally approve a conference agreement which includes the dual rate system, because that feature is in violation of section 14(3), and because such approval would be tantamount to delegating to the conference the right to exclude Isbrandtsen from engaging in commerce. The last of the foregoing objections is based on the ground that the Congress has not delegated to the Board and the Board may not redelegate any such power to any conference, and that the threatened exclusion by the conference would deprive Isbrandtsen of its property without due process of law.

When the case came on before the examiner, Isbrandtsen filed copies of the proceedings in the District Court, the conference agreements, the contracts and rates, and thereupon rested, arguing that the dual rate system on its face showed a *prima facie* case of discrimination which was illegal *per se*. The record before us giving the history and actual operation of the system was developed from witnesses produced by respondents. All parties at interest were afforded opportunity to be heard, and after full adversary proceedings, the examiner recommended that the system should be found not to violate section 14(3) of the Act, and that the contracts as presented should, with minor changes, be approved. With the examiner's recommendations, we generally agree.

Isbrandtsen, an American corporation organized in 1941, succeeded an earlier corporation, organized in 1921, and both have had a history of ocean shipping operation independent from conference ties. Isbrandtsen insists that it

should have the right of unobstructed access to American shippers. Its vessels run in competition with conference liners. It claims that the offering of lower rates to shippers who agree to deal exclusively with the conference lines necessarily puts it at a disadvantage, and that the system restrains trade, encourages monopoly, and directly violates section 14(3) of the Act. Isbrandtsen apparently is not interested in joining any conference. It is important to note that membership in the conferences in question is and has been open to it, and that the Board's predecessors, in passing on conference agreements, have from time to time insisted that any responsible common carrier be accepted to conference membership on reasonable terms. *Pacific Coast European Conference*, 3 U. S. M. C. 11, at p. 14 (1948). So Isbrandtsen's alleged handicap as an independent, competing for cargo in the face of the conference contract system, is a handicap voluntarily assumed and not the result of exclusion.

Before discussing the contracts, some consideration should be given to the conferences. It may be agreed that the conference system tends to monopoly. This system, as above stated, is not here under attack and at this late date could not very well be, for Congress, as is well known, has chosen to approve a policy of regulated monopoly rather than cutthroat competition. Section 15 of the Act recognized carrier agreements

> "fixing or regulating transportation rates * * *; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; * * * or * * * providing for an exclusive, preferential, or cooperative working arrangement."

which under ordinary circumstances might be in restraint of trade, and authorized administrative approval thereof when they met statutory standards. The standards set forth in the same section authorize disapproval when the conference agreements are found to be

> "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, * * *

or to operate to the detriment of the commerce of the United States, or to be in violation of this Act."

Referring first to the prior decisions of our predecessors, it must be pointed out that the attack made against the dual rate system in this case is substantially the same as was made in *Pacific Coast European Conference Agreement*, *supra*, in which the Department of Justice and the Department of Agriculture participated. What the Maritime Commission said in that case is so appropriate here as to require extensive quotation (p. 16):

"Every decision, whether by a court or by us or our predecessors, since the passage of the Shipping Act, involving the legality of the contract rate system, has rested upon the facts presented in the specific case. Wherever the system has been condemned the decision has turned on some circumstance which resulted in a discrimination, or in detriment to the commerce of the United States, or in some violation of the Shipping Act, 1916. No administrative finding sustaining the lawfulness of the system has been reversed by the courts.

"Although practically all of the points of attack against the lawfulness of the contract rate system were made in *U. S. Navigation Co.* v. *Cunard S. S. Co., Ltd.*, 284 U. S. 474, the court did not pass upon the merits of the complaint but decided that the matter should have been presented initially to the Shipping Board before resort was had to the courts. It is significant that no further action was taken by complainant in that case.

"We cannot ignore the fact in *Swayne & Hoyt* v. *U. S.*, 300 U. S. 297, the Supreme Court did not hold that the contract rate system was in violation of section 14 of the Shipping Act, 1916, or that the establishment of two different rates for identical services (contract and non-contract) was in itself unduly and unjustly preferential. In giving full consideration to the decision of our predecessor the court decided that the interpretation which had been placed upon the

facts by our predecessor was substantially supported, and that the court was not empowered to make a contrary finding.

"Contrary to the arguments made to us, Congress was informed before it passed the Shipping Act, 1916, of the existence of the contract rate system as well as of the deferred rebate system. Congress took occasion to prohibit the latter specifically. It is reasonable to suppose that had it intended to prohibit the former it would have said so with equal force.

"We can find no authority that the contract rate system is unlawful *per se*. * * *"

In 1933 the dual rate system was under attack in the case of *Rawleigh* v. *Stoomvaart et al*, 1 U. S. S. B. 285, on the ground that it violated section 14 (3) as well as other sections of the Act. The shipping Board pointed out that the dual rate practice had then been in effect for many years and had received the approbative attention of the Congressional Committee which drafted the 1916 Act. The Board expressly found that the system did not violate section 14 (3). The practice of our predecessors has been to examine the details of each dual rate system which has been presented, and determine whether there was violation of any express prohibition of the Act, or whether any features were unreasonable or unjustly discriminatory. In a number of the reported decisions of our predecessors, dual rate systems have been disapproved on the latter ground. So in *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41 (1922), a dual rate structure put into effect by a single carrier permitting shippers no choice of service, was disapproved. Again, in *Intercoastal Investigations, 1935*, 1 U. S. S. B. B. 400, and in 1936, *Gulf Intercoastal Contract Rates*, 1 U. S. S. B. B. 524, the Secretary of Commerce determined that the application of the dual rate system in the *intercoastal* trade was unreasonable because of the statutory rate protection there given to intercoastal carriers under the Intercoastal Shipping Act, 1933. The latter of these two cases was, of course, the one reviewed by the Supreme Court under the name of *Swayne &*

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Hoyt, Ltd. v. *United States, supra,* wherein the disapproval of the dual rate system was based on the Secretary's finding of unreasonableness, and not on the ground of violation of section 14 (3). The court, in a note appended to its opinion (p. 307), discussed the particular interpretation of section 14 (3) urged by Isbrandtsen in this case, but did not adopt it.

Based on the interpretation above outlined, our predecessors since 1931 approved no fewer than 32 conference agreements which provide either specifically or inferentially for the dual rate system—and of these agreements, 24 are now in effect and the respective conferences are making active use of the dual rate system.

It may be noted in passing that complainant's predecessor corporation, Isbrandtsen-Moller, adopted for itself an exclusive patronage dual rate system from 1937 to 1939 and filed 176 dual rates with the Maritime Commission, thus apparently at that time agreeing with the Commission's interpretation of the law.

Secondly, complainant's interpretation of section 14 (3) of the Act would make any harmonious construction or administration of the Act most difficult. If an agreement between carriers submitted to the Board for approval under section 15 were found to contain no unjust or unreasonable discrimination, it would pass muster so far as that section and sections 16 and 17 are concerned. The Board cannot believe that a different standard was set up for testing such agreements by section 14 (3), which might require an opposite finding. It is to be noted that section 15 of the Act expressly requires the filing by carriers of all agreements including any "giving or receiving special rates". We consider that the lower of the two rates shown in the dual rate tariffs filed in this case to be a "special rate" of this description. Possibly, and in order to harmonize with other language in the same section and with other sections, the naked word "discrimination" in section 14 (3) should be held to mean "unjust" or "unreasonable" discrimination. *United States* v. *Wells-Fargo Express Co.*, 161 Fed. 606, affirmed 212 U. S. 522; *U. S. Navigation Co.* v. *Cunard S.S. Co., Ltd.*, 284 U.S. 474.

Finally, we feel that the language of section 14 (3) of the Act is not to be considered as a standard for judging all carrier agreements, but establishes a prohibition against an undesirable practice, i.e., "retaliation". To retaliate is defined in Webster's New International Dictionary, 1945 Unabridged Edition, as "to return like for like" or "evil for evil". Retaliation perhaps connotes the idea of vengeance. Such conduct among carriers in their relations with shippers is in our judgment the evil which section 14 (3) was designed to prohibit. We cannot view the adoption of the dual rate system or the charging of a higher rate to a shipper who voluntarily declines to give his exclusive patronage as a "retaliation". The higher rate cannot be said to be charged as a retaliation for "patronizing any other carrier". It is charged because the shipper does not sign the contract, regardless of whether or not he patronizes any other carrier. A non-signing shipper who does not patronize a non-conference carrier is treated as harshly as a non-signing shipper who ships partially or exclusively with such a carrier.

The history of the various subsections of section 14 appears to support the above analysis. Section 14 (1) made unlawful payment of deferred rebates, a practice which prevailed prior to the 1916 Act, and up to that time had not been held unlawful by the courts. *United States* v. *Prince Line*, 220 Fed. 230 (1915), reversed as moot, 242 U.S. 537. Section 14 (2) made unlawful the use of fighting ships, a practice which even before the 1916 Act was frowned on by the courts in the same case. Section 14 (4) made unlawful all contracts and rates which unfairly and unjustly discriminated between large and small shippers. Finally, and in addition to the foregoing practices which were considered and condemned in the Alexander Committee Report (Report, *supra*, p. 421), section 14(3) made unlawful "retaliation" as there defined. A real case of retaliation had been before the courts [*Menacho* v. *Ward*, 27 Fed. 529 (1886)] and was a leading precedent prior to 1916, and in it real carrier retaliation had been condemned. There, two steamship lines engaged in the New York-Cuba trade had increased their rates to plaintiffs because plaintiffs had pre-

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viously made shipments via tramp carriers in the trade. This was retaliation for the shipper's previuos action. The case involved no contract between the shippers and the carriers, a circumstance which was deemed important to the decision, as appears from the following extract, p. 533:

> "The defendants, to maintain the affirmative, assert that their charges are fair because they do not have the whole of the complainants' carrying business. But it can never be material to consider whether the carrier is permitted to enjoy a monopoly of the transportation for a particular individual, or class of individuals, in ascertaining what is reasonable compensation for the services actually rendered to him or them. *Such a consideration might be influential in inducing parties to contract in advance;* but it has no legitimate bearing upon the value of services rendered *without a special contract*, or which are rendered because the law requires them to be rendered for a fair remuneration." (Emphasis supplied.)

We believe that section 14 (3) was a codification of the common law illegality of retaliation as appearing in the *Menacho* decision. We believe that the distinction between what we regard as real retaliation as condemned in the *Menacho* case, on the one hand, and the dual rate system now under consideration, on the other hand, was recognized in the case of *Lough* v. *Outerbridge*, 143 N. Y. 271 (1894), also decided under the common law well before the 1916 Act. The New York case last cited found nothing unlawful in the dual rate system, expressly pointing out that the *Menacho* case applied to an entirely different situation, the court explaining, p. 280:

> "The authorities cited seem to me to remove all doubt as to the right of a carrier, by special agreement, to give reduced rates to customers who stipulate to give them all their business, and to refuse these rates to others who are not able or willing to so stipulate, providing, always, that the charge exacted from such parties for the services is not excessive or unreasonable."

See also *Mogul S.S. Co.* v. *McGregor* (1892), App. Cas. 25, at p. 36.

Isbrandtsen's further argument against our construction of section 14 (3) is that where two interpretations are possible, that one which renders the Act unconstitutional in operation should be avoided. Isbrandtsen claims that a construction which approves the dual rate system is equivalent to granting to the conference the power to exclude Isbandtsen and other independents from the trade, that such power to exclude is equivalent to a power to grant certificates of convenience and necessity such as Congress sometimes gives to regulatory bodies, but has not given to this Board with respect to foreign trade. Isbrandtsen argues that since this Board may not grant or withhold such certificates, it may not (by our construction of the Act) delegate any such power to a conference without violating several sections of the Federal Constitution and the 5th Amendment.

We think this argument is far-fetched. In the first place, there is no evidence that the dual rate system has in the past, or will in the future, effectively cause the exclusion of an independent carrier from any trade route on which he wishes to operate. This is particularly apparent from the fact that there is a standing invitation to all independents to join the conferences and to operate on the same footing with conference members. The construction which the Board adopts for section 14 (3) places no restrictions on Isbrandtsen's rights to enter any trade and gives no conference or conference members any right to do so.

Having thus considered the contentions of the parties as to the proper construction of section 14 (3) of the Act, we must determine whether the dual rate system as presented in this case qualifies for approval under section 15. That system in many cases is a necessary part of the conference system. The evidence in this case shows that eastbound conference members had, in 1948, 518 sailings as against 38 by complainant. Complainant and its predecessor over a period of 17 years, except during World War II, have maintained at least two sailings a month on the route. Under the conference agreement, uniform rates are offered to all shippers who sign the conference contracts, and a uniform but

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higher rate is offered to all who do not. There is evidence that the conference system guarantees uniform rates, prevents cutthroat competition, and encourages frequent and regular scheduled sailings; also, that shippers are willing to pay rates to sustain stability and frequency of service, which means more to them over a period of time than being able occasionally to avail themselves of somewhat lower rates offered by non-conference carriers. There is also evidence that even though rates of conference members are identical, there is competition among the members in the matter of the service offered. As stated above, the conference system is not under attack, yet it is important to state that there is evidence in the case, if that be needed, to support a finding that the conference agreements, as distinguished from the dual rate system contemplated by them, meet the requirements of section 15 of the Act and deserve the approval which they have heretofore received from our predecessors.

If the conference members are to provide the service which the shippers value, the service must be matched by a regular availability of cargo from those shippers. The conferences realize that to sustain these mutual benefits, something more than voluntary shipper cooperation must be agreed to. The dual rate system is the device which has been developed for that purpose. Shippers have testified in this case that they deem the stability of rates and regularity of service which a conference can offer are worth a price measured in terms of freight rates. By obtaining exclusive contracts from shippers the carriers are better able to estimate the approximate volume of traffic that is to be expected, tonnage their routes, and arrange their sailings accordingly. As previously indicated, the contracts under consideration guarantee to the shipper that his rate will not be changed for approximately 80 days, and the evidence shows that longer commitments are sometimes granted. In any event, small shippers are put on the same plane with large shippers and both are thus encouraged to engage in "forward trading", so necessary for foreign commerce.

There is a complaint by one of the interveners that the contracts under discussion are unenforceable at law because

lacking legal consideration. We believe a technical consideration sufficient to support the contract is found in the agreement of the carrier not to change rates for a specified time in exchange for the agreement of the shipper to ship exclusively by the conference carriers. However, the question of technical consideration and legal enforceability does not seem to us all-important in this case for it is clear from the evidence that the contracts once made are in fact observed without resort to court action, and our problem is to determine whether the agreements by the conference carriers to put the dual rate system into effect (regardless of enforceability) is to be approved under section 15. We find in general that the dual rate system disclosed by the evidence in this case is not contrary to the standards set up in the Act.

On the other hand, one feature of the contract which we think objectionable has to do with the option given to the carrier if the shipper makes shipments in violation of the agreement. The contract provides that in such a case

> "the Carrier shall have the option to declare this agreement terminated and the Merchant shall be liable to the Carrier for liquidated damages equal to twice the amount of freight that would have been payable under the contract in respect of the shipment constituting the violation."

Our predecessors have pointed out that an option of this sort makes it possible for the carrier to discriminate between shippers, *Pacific Coast European Conference, supra.* We think this objection is valid. Any approval which we give to the use of the dual rate system in this case is conditioned upon the modification of the contract form by the carriers so as to eliminate the option feature and substitute therefor the specific treatment which will be accorded shippers in all cases of violation.

The contract provides for liquidated damages in case of violation equal to twice the amount of freight that would have been payable under the contract in respect to the shipment constituting the violation. Our predecessors have considered the reasonableness of liquidated-damage provi-

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sions for violation of contracts of this sort. We agree that this type of contract is one in which a liquidated-damage provision may be incorporated, because the harm caused by breach is extremely difficult if not impossible of accurate estimation. Of course, the agreed measure of damages must bear a reasonable relation to the breach so as to class it as real damages and not as a penalty. In this case the contract provides for liquidated damages in twice the amount of the freight involved. Perhaps this is on the high side, but since by a violation some member of the conference whose ship has sailed, has lost the freight involved, and the conference as a whole has been weakened by the violation, we think the provision is not unreasonable and may be retained. In *Pacific Coast European Conference, supra,* our predecessors approved a liquidated-damage feature for breach of exclusive patronage, limited to an amount equal to the freight involved in the shipment or a certain number of times thereof. Court approval of a somewhat similar liquidated-damage clause was given in the case of *North German Lloyd* v. *Elting*, 96 Fed. 2d 48.

The fact that the conference collects the damages instead of an individual carrier, does not militate against reasonableness, since there will be damage to an individual though unascertained member of the conference as well as to the conference as a whole. The collection of damages by the conference appears to be a practicable measure to make the contracts effective for the benefit of the conference members. The result is in substance a pooling of damages, analogous to the pooling of earnings or profits which the Act, section 15, expressly authorizes.

An objection is made to the clause of the contract which requires that all the shipper's cargo originating out of North Atlantic ports be tendered to the carriers for transportation on their vessels at seven American and several Canadian named ports. It is claimed that this clause may discriminate against a shipper who has cargo located at an intermediate unnamed port, or perhaps discriminate as between the named and the unnamed ports. The named ports include the seven major American ports between Norfolk, Virginia, and Portland, Maine, and it would seem that the shipper is thus given a broad selection of ports from which

to choose. The carrier cannot be required to serve ports beyond his choosing and we cannot, therefore, say that the designation of the named ports creates any unreasonable discrimination as claimed.

We think the special treatment accorded to the Department of Agriculture on Government-owned or -controlled cargo, in granting to it the lower contract rate without requiring the Government to sign a contract, is a reasonable exception in the public interest and is not a discriminatory practice.

Exceptions not discussed in this report nor reflected in our findings have been given consideration and found not justified.

FINDINGS

We find as follows:

1. The findings contained in the report of the examiner are a substantial compliance with the orders of reference of the Commission of December 19, 1949 and January 13, 1950.

2. The provision contained in the eastbound contract permitting termination of the contract and the collection of damages by the conference at the conference's option, is unreasonable and should be eliminated.

3. The use of the dual rate system by the two conferences and their members is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and does not operate to the detriment of the commerce of the United States, and is not in violation of the Shipping Act, 1916, provided that the form of contract used shall be modified so as to be in keeping with finding (2) above.

An order will be entered dismissing the complaint.

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ORDER

At a Session of the Federal Maritime Board, held at its office in Washington, D. C., on the 1st day of December A. D., 1950.

No. 684

ISBRANDTSEN COMPANY, INC.

v.

NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE, ET AL.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Board, on the date hereof, having made and entered of record a report containing its conclusions, decision, and findings thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the complaint herein be, and it is hereby, dismissed.

By the Board.

A. J. WILLIAMS, *Secretary.*

APPENDIX E

SHIPPING ACT, SECTIONS 14, 15, AND 22

Sec. 14 (46 U. S. C. 812; 39 Stat. 733):

"That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District or possession of the United States and any other such port or a port of a foreign country—

* * * * * * *

"Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are

available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

"Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

"Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense."

* * * * * * *

Sec. 15 (46 U. S. C. 814; 39 Stat. 733):

"That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

"The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers,

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shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

"Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

"All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

"Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes', and amendments and acts supplementary thereto.

"Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

* * * * * * *

Sec. 22 (46 U. S. C. 821; 39 Stat. 736):

"That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall within a reasonable time

specified by the board satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

"The board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this Act."

(5730)